APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19427

AMERICAN TRUCKING ASSOCIATIONS, INC.,
BETHLEHEM STEEL CORPORATION, et al., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

INTERNATIONAL BUSINESS MACHINES CORPORATION,
WESTERN UNION TELEGRAPH COMPANY,
NEW YORK CENTRAL RAILROAD COMPANY,
DOW JONES & COMPANY, INC., INTERVENORS

No. 19464

TWIN COAST NEWSPAPERS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

WESTERN UNION TELEGRAPH COMPANY, INTERVENOR

No. 19465

THE ASSOCIATED PRESS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

WESTERN UNION TELEGRAPH COMPANY, INTERVENOR

No. 19466

AERONAUTICAL RADIO, INC., et al., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

WESTERN UNION TELEGRAPH COMPANY,
NEW YORK CENTRAL RAILROAD COMPANY, INTERVENORS

No. 19467

AMERICAN TELEPHONE AND TELEGRAPH CO., et al.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

WESTERN UNION TELEGRAPH COMPANY,
NEW YORK CENTRAL RAILROAD COMPANY,
DOW JONES & COMPANY, INC.,
INTERNATIONAL BUSINESS MACHINES CORPORATION,
INTERVENORS

No. 19472

LOCKHEED AIRCRAFT CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

WESTERN UNION TELEGRAPH COMPANY, INTERVENOR

No. 19475

XEROX CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

WESTERN UNION TELEGRAPH COMPANY, INTERVENOR

No. 19479

UNITED STATES OF AMERICA, ACTING THROUGH THE ADMINISTRATOR OF GENERAL SERVICES, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

WESTERN UNION TELEGRAPH COMPANY, INTERVENOR

On Petitions to Review Orders of the Federal Communications Commission

Decided September 15, 1966

Mr. Robert H. Young, with whom *Mr. Jeremiah Courtney* was on the brief for petitioners in No. 19427, argued on behalf of petitioners in No. 19427; petitioner in No. 19464, petitioner in No. 19465, petitioners in No. 19466, petitioner in No. 19472, and petitioner in No. 19475.

Mr. Howard J. Trienens, of the bar of the Supreme Court of Illinois, *pro hac vice,* by special leave of court, with whom *Messrs. J. Edward Day, Jules M. Perlberg,* and *Gary L. Cowan* were on the brief, for petitioner in No. 19467.

Mr. Thomas J. O'Reilly, Assistant General Counsel, General Services Administration, of the bar of the Supreme Court of Virginia, *pro hac vice,* by special leave of court, with whom *Mr. J. E. Moody,* General Counsel, General Services Administration, was on the brief, for petitioner in No. 19479. *Messrs. John T. Ketcham* and *Paul P. Fitzpatrick,* Attorneys, General Services Administration, also entered appearances for petitioner in No. 19479.

Mr. John H. Conlin, Associate General Counsel, Federal Communications Commission, with whom *Mr. Henry Geller,* General Counsel, and *Mr. Robert D. Hadl,* Counsel, Fed-

eral Communications Commission, were on the brief, for respondents. *Mrs. Lenore G. Ehrig,* Counsel, Federal Communications Commission, also entered an appearance for respondent Federal Communications Commission.

Mr. Jack Werner, with whom *Messrs. Melvin Richter* and *John H. Waters* were on the brief, for intervenor Western Union Telegraph Company.

Mr. Donald C. Beelar was on the brief for petitioners in Nos. 19464 and 19465. *Mr. James M. Johnstone* also entered an appearance for petitioners in Nos. 19464 and 19465.

Messrs. Donald C. Bellar, Paul A. Porter, John E. Stephen, and *Harold L. Russell* were on the brief for petitioners in No. 19466. *Mr. James M. Johnstone* also entered an appearance for petitioner in No. 19466.

Messrs. James A. McKenna, Jr., Joseph M. Kittner, and *Aaron I. Fleischman* were on the brief for petitioner in No. 19472.

Messrs. Paul A. Porter and *Reed Miller* were on the brief for petitioner in No. 19475.

Mr. Charles R. Richey was on the brief for intervenor New York Central Railroad Company in Nos. 19427, 19466 and 19467.

Messrs. Lloyd N. Cutler, Louis F. Oberdorfer, J. Rogers Wollenberg, and *David R. Anderson* were on the brief for intervenor International Business Machine Corporation in Nos. 19427 and 19467.

Mr. William J. LeBuhn entered an appearance for intervenor Dow Jones & Company, Inc., in Nos. 19427 and 19467.

Before BAZELON, *Chief Judge,* PRETTYMAN, *Senior Circuit Judge,* and WRIGHT, *Circuit Judge.*

PRETTYMAN, *Senior Circuit Judge:* These are petitions to review three orders of the Federal Communications Commission relating to rates of the American Telephone and Telegraph Company. The eight proceedings, separately filed, were consolidated for argument and decision. The three orders are a Tentative Decison, released March 20, 1964, a Memorandum Opinion and Order, released December 24, 1964, and a Memorandum Opinion and Order, released May 4, 1965. Petitioners and intervenors are communications common carriers, users and potential users of bulk communications service, and the Federal Government through its General Services Administration.

In January, 1961, the American Telephone and Telegraph Company filed with the Communications Commission a tariff in which it announced rates for a new service, called by it "Telpak". The new service was offered, said the Company, to meet the growing requirements of government and industry for large capacity communication facilities between specified points. The service would provide communications paths of various widths capable of transmitting various forms of electrical communication, such as telephone, teletypewriter, control, signalling, facsimile and data. Four sizes of channels were offered, one a carrier spectrum assignment of 48 kilocycles per second (called Telpak A), one of 96 kc (called B), one of 240 kc (called C), and the fourth approximately a thousand kilocycles per second (called Telpak D). Telpak A was stated to be equivalent in capacity to 12 voice circuits, "B" to 24 voice circuits, "C" to 60 such circuits, and "D" to 240. The Company said it would provide channelizing equipment to subdivide Telpak channels into channels of lesser width, which it called "derived" channels, or it would terminate [1] the entire channel for use as a broad-

[1] The word "terminate" refers to the end use to which the service is put. "Terminating equipment" is this equipment thus used; for example, a telephone, equipment suitable for telephotograph, and various types suitable for data communication.

band transmission medium. The rate structure was in two elements, (1) a flat monthly rate per mile for the basic transmission path and (2) monthly rates for terminating the channels at the customer's premises. In nontechnical language this latter meant a rental for the equipment by means of which the electric energy was to be put to use.

Almost immediately a controversy arose. In less than a month Motorola, Inc., a manufacturer of radio equipment, moved for suspension of the tariff and for an inquiry and hearing. And about a month thereafter the Western Union Telegraph Company filed a petition in which it alleged that the Telpak tariff was an offering of broadband electrical paths of specified bandwidths and that a diversity of routing of channel components to make up a Telpak channel was not permissible under it. It further alleged that the Telephone Company had offered to furnish total channel requirements and to apply Telpak tariff schedules to such total, despite the fact that the channels, being over a diversity of routes, could not, or would not, be combined into a single broadband electrical path. In effect, said Western Union, the Telpak tariff would be applied to existing channel facilities however dispersed. This, it further said, was improper application of the tariff.

At this point we interrupt the thread of our statement to note several underlying facts of importance to the controversy.

The A. T. & T. has had for some years a service known as "private lines". A customer can lease equipment and service which permit him to communicate between given points whenever and as much as he pleases without going through the usual call-and-hook-up process. This private line service includes not only telephones but all sorts of communication facilities, such as almost instant reproduction of documents and photographs at long distances. The

services include telephone, telegraph, telephoto, data transmission, remote metering, supervisory control, and miscellaneous signalling and multiple channel service. Tariffs providing the rates for these private lines have long been in effect.

Modern government and modern industry have begun to require mass communication. Modern science has kept pace with these requirements. Thus in a nation-wide business the management frequently does not wish to read over a telephone from a central office to one or several branch offices the details of a statistical report. Waste of time and very great possibility of error in transmission would be thus involved. Management wants to reproduce the report in San Francisco exactly as it exists in New York. Science has supplied the means for doing this. And similarly there is equipment and carrying ability for many sorts of data, voices, automatic typewriting, photographic reproduction, signalling devices, and what is called merely data transmission.

These various instrumentalities require transmission channels of different widths. Thus transmission of the human voice requires a channel of 4 kc width. The voice is not a monotone; it embodies a number of tones. Thus it cannot be transmitted by a single beam of one frequency. It requires a composite of frequencies, ranging in width four kilocycles per second; for example, from 16 kc to 19 kc or from 27 kc to 30 kc. The more complicated data transmission requires channels of the width of 1000 kc. As we have pointed out, A. T. & T. offers these services (all of them except for highly sophisticated data transmission) on a private line basis. Such service for voice transmission, *i.e.*, telephone service, is in high demand; for other more complicated transmission the demand is, of course, less or non-existent as of the present time.

Private line services may be wanted on a multiple basis. A large industrial concern or the Government may want

more than one private telephone line. It may want ten, twenty or fifty such lines. Prior to the events here under consideration these needs were met by A. T. & T. and charged for by application of its private line tariffs.

In 1960 the Communications Commission made available to private use the higher frequencies in the broadcast spectrum—890 and over.[2] This permitted industrial concerns to maintain their own electric communications systems by microwave. Transmission by broadcast waves was effective for all the purposes we have mentioned as desired by big business and government. Equipment for this purpose was on the market. Thus a threat appeared to the common carriers in the rapidly developing field of mass business. A. T. & T. saw the potential slipping from it, and this was the sperm in the conception of Telpak.

A wide disparity appears between the rates proposed for Telpak service and those in effect for the same quantity of power and equipment under the private lines services. This disparity is startling, as illustrated by the following monthly rates:

	Individual Private Lines[3]	Telpak
(A) 12 Voice Grade Channels	$ 3,780	$ 1,860
(B) 24 Voice Grade Channels	7,560	2,720
(C) 60 Voice Grade Channels	18,900	4,300
(D) 240 Voice Grade Channels	75,600	11,700

There are wide differences between the charges for other types of transmission equipment and capacity in the two services.

We return to the the thread of the case. The question at this stage (*i.e.*, upon the filing of the petition by Western

[2] Allocation of Microwave Frequencies Above 890 Mc, 27 F.C.C. 359 (1959), 29 F.C.C. 825 (1960).

[3] Equipped for voice only at 100 miles.

Union) was whether A. T. & T. was complying with the terms of the tariff as filed. A. T. & T. admitted it was doing as Western Union said it was; it claimed the tariff permitted it to do so. The Commission made plain that no question was then raised with respect to the furnishing of a single broadband channel, which the customer might use as a single channel or might subdivide into channels of lesser width. "The question," said the Commission, "is presented, however, by the practices, admitted to by A. T. & T., of applying Telpak rates in those cases where a customer is not provided a single broadband channel, but instead is furnished a number of channels of lesser bandwidth which are not derived from a single broadband channel, but are derived instead from a variety of convenient sources. Thus, for example, take the case of a customer who has a requirement for 12 telephone channels and therefore orders a Telpak A service. A. T. & T., at its discretion, may provide the service over a single broadband channel of 48 kc subdivided by appropriate channel terminal equipment into 12 telephone channels. The practice here in issue arises where A. T. & T. chooses to provide the service over diverse facilities or routes utilizing channels of lesser bandwidth which are not derived from a single broadband channel (*e.g.*, 2 channels furnished on voice frequency cable, 4 on a microwave system, 3 on coaxial cable, 2 on an N carrier system and 1 on open wire line)."

Over the opposition of A. T. & T. the Commission held that the Telpak rates were not applicable to service furnished in the manner described as being in issue. The Commission said: "A multiplicity of channels of lesser bandwidth, derived from different facilities and types of facility, many of which are over diverse physical routes, is not by any test a 'communication path', a 'Telpak channel' or a 'broadband transmission medium.'" The Commission then ruled that service thus furnished was

not distinguishable from that offered under other tariffs of the Company, referring to the private line tariffs.

Very cogently the Commission said that if the terms of the Telpak tariff were analyzed it would be readily apparent that the only thing which distinguished the derived channels referred to in that tariff from the channels furnished under the private line tariffs "is the provision that the individual channels involved will be derived from the use of terminal equipment applied to a discrete Telpak broadband channel." The Commission concluded: "In any case, our interpretation permits the Company to derive Telpak channels as they wish, provided they are Telpak channels as defined in the tariff."

A. T. & T. responded to this ruling by amending the Telpak tariff so as to include a provision that "A Telpak channel or derived channels may be furnished by such physical facility arrangements appropriate for the forms of communication specified as the Telephone Company may elect for efficient utilization of available physical facilities, whether or not in the form of a single carrier spectrum assignment and whether or not the entire Telpak channel or all derived channels are on the same physical facility."

Thus the issue was drawn. The Commission set for hearing the question whether the rates as thus provided were discriminatory and unlawful.

Meantime and thereafter a complex of proceedings developed. Motions were made, argued, and disposed of. Briefs were filed. Intervenors appeared. In all, from start to finish, over 750 items appear on the Certified Index of the administrative Transcript of Record. The record shows 26 orders entered in the case. On September 8, 1961, the Commission issued an order in which it instituted an investigation of the Telpak tariff, listed questions to be considered, set a hearing, and directed

that an examiner be designated who should certify the record to the Commission "without preparing either an Initial or Recommended Decision". Thirty-six days of hearings were conducted by the examiner, and proposed findings and conclusions, with supporting briefs, were filed with him. The entire record was certified to the Commission without initial or recommended decision. On March 20, 1964, the Commission issued a Tentative Decision and invited exceptions to it. On December 24, 1964, after oral argument before it *en banc,* the Commission issued a Memorandum Opinion and Order. It passed upon the questions presented. On May 4, 1965, in response to numerous pleadings filed subsequent to December, 1964, the Commission issued another Memorandum Opinion and Order. The findings and conclusions of the Tentative Decision were in major part affirmed without extended discussion. Our review, therefore, is directed procedurally to the more comprehensive Tentative Decision of March 20, 1964.

To place the problem in easier perspective we state first the conclusion last stated by the Commission in its orders. This was to remand Telpak C and D for further evidence and study. The Commission did not make final findings or reach final conclusions in respect to the two Telpak subdivisions which dealt with carrier bandwidths of 240 kc (Telpak C) and 1000 kc (Telpak D). It remanded those two parts of the Telpak tariff. It considered the parts of the tariff dealing with carrier wave bandwidths of 48 kc and 96 kc, that is, Telpak A and B.

The first phase of the problem with respect to these parts (A and B) is whether the services furnished under them are "like" services of the same quantity furnished under private line tariffs. Could a customer obtain communication service and facilities under Telpak (exclusive of broadband data channels) different in any material functional respect from those available under other tariffs

already on file? For example, if a customer orders Telpak A service for telephone, does he get service "like" that which he would get if he ordered service for 12 telephones under private line tariffs? In each case the Company supplies energizing electricity of the same sort and in the same quantity. In each case it supplies the "terminating" equipment, the same in each instance.

Telpak channels (other than broadband data channels) are not necessarily discrete channels of the specified width. The amendment to the tariff made this clear. The types of facilities available are described in the Telpak tariff in terms of, and by reference to, the private line tariffs. So on the face of the tariff there is no distinction. Nor does the concept of base capacity reflected in the several sections of the Telpak tariff (for example, 48 kc in Telpak A) establish any difference from private line service, since in a Telpak contract only the channels required by the customer are set aside for his use. The other channels embraced within his contract (for example, 12 voice channels in Telpak A) are simply not allocated.

The vice president of A. T. & T. directly in charge of planning Telpak was offered by the Company as a witness before the examiner. The first question asked him on direct examination, after the introductory formalities, was "What is Telpak service?" The first sentence of his answer was "Telpak is a form of private line service." An undetermined number of private line customers of the Company at the time of the introduction of Telpak were given the new rates with no change whatever in the facilities they were being furnished. So the Commission concluded that private line services and Telpak derived channels are "like" communication services.

The Commission noted the great differences between Telpak and private line rates, which we have described, and held that since the two services were "like" it was

incumbent upon the carrier (A. T. & T.) to justify the differences in the prices.

The Commission entered upon a consideration of justifications for differences in prices of utility services. One possible justification for such differences is a difference in cost to the carrier. A. T. & T., the Commission said, advanced reasons for cost differentials in respect to Telpak but made no cost study. The Commission described the complexity of administering the myriad of possible routings for pricing purposes under Telpak. It suggested the possibility of higher costs for Telpak and depicted at length what it conceived to be infirmities in the A. T. & T. arguments in respect to costs, absent a factual study. It found no material cost differences attributable to furnishing a given number of circuits to a single customer under Telpak rather than to several customers on a circuit by circuit basis.

The next justification to be discussed was deemed by the Commission to be the principal contention of A. T. & T. This is the necessity to meet competition. Translated for application to the interests of the customers, the point is that if business is obtained or retained lower unit costs are achieved and these benefit the other customers. The justification for the difference in prices rests upon this foundation of benefits to all customers. The competition sought to be met in this instance was the private microwave system. The Commission noted that only one major private microwave system of the type here involved was then actually in operation. But it went on to discuss a report A. T. & T. had obtained from a firm of private engineers as to the costs of private microwave relay systems and as to the magnitude of the bulk communications market. The Commission examined and discussed this report in great detail. It also examined a cost study presented by the Motorola Company.

The Commission found "major infirmities" in the private microwave cost study presented by A. T. & T. First

was the fragmentary factual information upon which it was built. Second, the systems selected for study were based on historical rather than current costs. Third, the record cast grave doubts upon the accounting methods employed. Furthermore the Commission pointed out that in comparing private microwave systems with common carrier systems other factors must be borne in mind. Chief among these is reliability, the availability of technicians and maintenance personnel and of alternate facilities. Another factor is the inability of microwave to interconnect with common carriers, and another is reluctance on the part of many companies to tie up the capital requisite for a private microwave system. The Commission prepared and included in its opinion a table showing a comparison of common carrier rates and private microwave costs. From these figures the Commission concluded that as to Telpak A there was no justification for lower rates to meet microwave competition and that as to Telpak B private line rates are reasonably competitive with microwave. So it found no justification for lower Telpak A or B rates on the ground of competitive necessity.

Upon consideration the Commission concluded that the Telpak C and D rates were justified by competition, and this conclusion necessitated a determination as to whether these rates were compensatory, that is, whether they would bear their own costs or would be a burden on other customers of the Company. Long discussions of a bulk communications market study, of A. T. & T.'s analyses of anticipated Telpak costs, and of the ratio of route to airline pricing miles were included in the opinion. We need not relate them in detail. Upon completion of these inquiries the Commission was unable to determine whether the C and D rates would sustain the burden of their own costs and thus supply a justification of the difference between those rates and the rates charged other customers. However, since the disposition of sections C and D of the Telpak tariff is not before us on this appeal, we need not consider this phase of the matter.

The Commission concluded with four summary paragraphs:

(a) Telpak and private line services are "like" services.

(b) No material cost differences are attributable to Telpak service as compared to private line services.

(c) Telpak A and B are not justified by competitive necessity.

(d) The Commission was unable to determine on this record that the rates for Telpak C and D are compensatory and therefore was unable to find that those two services would benefit other users of A. T. & T. services.

It is to be emphasized that in its opinion and decision the Commission did not treat simply of the sale of broadband channels. In fact on this record the Commission held that the Telpak tariff as originally presented did not permit the assembly of separate channels to make a total capacity equal to a Telpak channel and the sale of that "conglomeration" as a Telpak channel. That, said the Commission clearly and bluntly, is not a Telpak channel. The present controversy arose after A. T. & T. revised the tariff to make clear that it was intended to permit the sale of the designated capacity at the proposed low rates regardless of the manner of the assembly of the channel. The A. T. & T. presents as its chief argument for Telpak the competition of microwave. But microwave is a broadband enterprise. It would seem that effective competition against it could be forged by the use of broadband channels. If A. T. & T. were to restrict its Telpak tariff to application to broadband sales, the problems which the Commission now sees in the venture would disappear. What other difficulties would be faced in such a tariff we do not now know. But the initial ruling of the Commission on the tariff as originally filed reflects indices of its attitude. It seems to us that the Commission is correct in saying that in so far as Telpak A and

B embrace the furnishing of a given quantity of service by miscellaneous means of the Company's choosing, it is "like" the service furnished under a contract for the same quantity of service under private line tariffs.

The precise points of attack by the Company upon the ruling of the Commission are not set forth with precision in the brief. The "Questions Presented", the Index under the heading "Argument", the "Statement of Points", the "Summary of Argument", and the several headings in the course of the "Argument" are couched in different terms in that brief. However the text of the Argument and the presentations upon the oral hearing make clear the thrust of the contentions.

The Company makes five points. These, it says, are separate but are interrelated in the sense that each relates to a fundamental error. This error, it says, is that the Commission held unlawful, as discriminatory, rates (1) which are compensatory, (2) without which the Company would lose business, and (3) as to which no evidence of any injury to any communications user appears. The error results, says the Company, from the Commission's erroneous interpretation of Section 202(a) of the Federal Communications Act.

I

A. T. & T. says the Commission erroneously interprets Section 202(a) of the statute[4] as imposing an absolute obligation to prevent unlawful discriminations, regardless

[4] 48 STAT. 1070 (1934), as amended, 47 U.S.C. § 202(a), reading as follows: "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

of the needs of users or other policy considerations. It says the statute affords protection where a particular rate is offered only to a certain user, and then offers protection against personal discrimination. It says the statute parallels Sections 2 and 3(1) of the Interstate Commerce Act,[5] after which this statute was patterned.

The Company says Telpak does not discriminate against anyone, since it is available to all. It finds this principle announced by the Supreme Court in *Interstate Commerce Commission* v. *B. & O. Railroad*[6] and in *Eastern-Central Ass'n* v. *United States*.[7] It says these cases establish that volume rates are lawful so long as they are available to all users; only where rates are a mere facade for rates which favor a particular user or class of users are they unlawful. The Company also says the second clause of Section 202(a) permits the Commission to protect users where no personal discrimination is involved but this protection can be invoked only where some particular person has suffered injury.

These contentions of the Company are obviously erroneous, it seems to us. The prohibition against different charges to different customers for like services under like circumstances is flat and unqualified. The pertinent section of the statute bristles with "any". It is made unlawful for "any" carrier to make "any" unjust discrimination by "any" means, or to make "any" undue preference to "any" particular person, or to subject "any" person to "any" undue prejudice. Moreover it is quite clear that this is not a matter of chance statutory semantics. It is a matter of public interest and policy. The money difference in price is the core of the proscription. Equal prices for like services is in itself a matter of public interest.

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[5] 24 STAT. 379-380 (1887), as amended, 49 U.S.C. §§ 1, 3(1).

[6] 145 U.S. 263 (1892).

[7] 321 U.S. 194, 201-202 (1944).

The prohibitory phrases were not in contravention of or an exception to the opening policy declarations of the statute, but were pursuant to and in furtherance of those declarations. The Supreme Court has spoken many times on this subject.[8]

We do not find in the *B & O.* case, *supra,* the doctrine the A. T. & T. finds there; that is, the doctrine that volume discounts are permissible whenever offered to all people. That case was a party-ticket case, and the Court seems to have justified the result by a difference in costs. The matter was treated with full explanations in the *Eastern-Central* case, *supra.* There the problem concerned the interplay of rail and water freight rates. The Court described the long-standing policy of the Interstate Commerce Commission, which at first rejected wholesale rates and then broke that rigid restriction by justifying a difference in rates by a difference in costs. Then came different modes of carriage (water and motor) with different methods of operation and different measurements of costs. The Court said that application of the principle that a difference in costs is the sole justification for rate differentials is well enough within the railroad area or the motor area but that when the two forms of carriage compete it is appropriate to consider a carrier's need to meet other carriers' competition. The Court rejected the argument that in such a situation competitive necessity is the sole consideration. It likewise rejected the contrary argument, that costs exclusively control. Conceivably, said the Court, circumstances might make one or the other factor

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[8] New York, New Haven & Hartford R.R. v. Interstate Commerce Comm'n, 200 U.S. 361, 391 (1906); Union Pacific R.R. v. United States, 313 U.S. 450, 461-462 (1941); Interstate Commerce Comm'n v. Baltimore & Ohio R.R., 225 U.S. 326 (1912); United States v. Chicago Heights Trucking Co., 310 U.S. 344 (1940); Seaboard Air Line Ry. v. United States, 254 U.S. 57 (1920). See also Maiatico v. United States, 112 U.S. App. D.C. 295, 301, 302 F.2d 880, 886 (D.C. Cir. 1962).

predominant, and in such a situation the choice would be for the Commission to make. This is the case before us. Here the Commission made inquiry into comparative costs and then into the competitive necessities. It weighed both factors. The choice was for it to make. This is the teaching of the *Eastern-Central* case as we read it.

II

A. T. & T. says the Commission's finding of competitive necessity does not relate to the same package of services which the Commission found to be "like" private line service. The Commission, says the Company, failed to test the competitive necessity of Telpak A and B in the same terms in which it found Telpak services to be "like" the private lines. In considering the latter problem, the Commission, says the Company, held that a customer could obtain under private line tariffs any package of services in any combination desired and thus duplicate the services proffered under Telpak; whereas, when the Commission considered whether competitive necessity justified the difference in rates, its comparison was limited to telephone channels. No consideration was given, says the Company, to any comparison of private microwave costs with respect to teletypewriter, data transmission, or any other service available under Telpak.

To this contention the Commission makes a short answer, that in the hearing before it the Company's witness used only telephone channel rates in his comparisons and the Commission had merely followed his lead in the matter. Further, the Commission pointed to the affidavit in the record to the effect that in the air transport industry, next to the Government, the largest user of private line channels, 94.8 per cent, is in voice grade circuitry. The independent study submitted by the Company indicated that about half the estimated bulk communications market is in the 48 kc or 12 voice channel area.

In making this contention the Company fails to adhere to what the Commission actually did. The Telpak tariff offered four sizes of channels, referred to as classifications, and provided separate rates for the base capacities and for the terminal equipment in each classification. The Commission treated these classes (A, B, C and D) separately in this part of its study. It found private line rates lower than microwave costs for the number of channels available under A. It found in respect to B that private line rates fell between the microwave costs submitted by A. T. & T. and those submitted by Motorola. The Commission found a competitive necessity for C and D. So the latter fall outside the range of this argument of A. T. & T. The flexibility, the range of service, etc., here emphasized by the Company do not fall to any great extent within Telpak A and B. The argument, when translated into terms within the actions really taken by the Commission, is that, whereas in finding Telpak A and B "like" private lines the Commission considered the full service offered in those two classes, when it considered competitive necessity it made a comparison based upon telephone channels. But the fact is that A and B are in major part telephone services. These are not the great broadband channels which modern industry uses for data and facsimile transmission. We repeat here that the Company, not the Commission, included in the Telepak problem all these narrow band channel services which presently form the vast bulk of the Company's business. The Company, not the Commission, made the comparison with microwave include so great a factor of telephone service.

We think the Company's argument on this point untenable when addressed to the disposition of the tariffs proposed for Telpak A and B. We think the Commission did not act erroneously when in comparing Telpak A and B with private microwave service it used telephone service figures only. If the Company's contention were addressed

to the treatment of C and D, it would appear to have greater validity.

Moreover, in this same regard, we note that the private line rates for telephone services are known, whereas the rates for the anticipated broadband services are as yet in major part speculative. The Commission was not in error in using the known data.

III

A. T. & T. says the Commission erred in using an "average" microwave cost for its comparisons. Here again the Commission points to the position taken by the Company itself at the hearing before it. The Company's witness, a Mr. Magree, clearly gave average (or mean) figures, and another Company witness, Mr. Scanlon, testified that, so far as cost is concerned, "the common carrier offering must be designed to meet average conditions". Motorola computed average figures. The Company says it submitted its evidence in terms of a range of costs, not as an average. The use of a range, it says, reflects the wide range in quality and reliability of microwave systems in use. But it must be apparent that a utility cannot use a rate structure with levels so minute as to meet every gradation in competitors' prices. The law against discrimination among utility customers prevents that. As the witness Scanlon said, a common carrier must aim at an average. And the question arises as to whether a range of prices really reflects the market. What proportion of the market is of poor quality, and what of superior quality? And we are not shown that the microwave costs include installation, which must be an appreciable sum.

The Company says that by using average cost as a measure of competitive necessity, the Commission has effectively precluded common carriers from competition for the business of users whose needs would be met by a microwave system of less than average cost, which the

Company equates with less than average quality. The Company says it is inherent in the Commission's view that private microwave systems be sheltered from competition except in the case of the more reliable systems. Several responses to this position are readily apparent. In the first place, as the Commission emphasized, differences in costs do not depict the whole of the competition between the common carrier and the private system. The reliability of the former, the availability at all times of mechanical technicians with the carrier, the interchangeability on the carrier system, and the necessity for the tie-up of considerable investment and installation funds in a privately owned system are all factors in the competitive picture.

Moreover the argument overlooks the fact that the Commission has not fixed the levels of Telpak rates; it has merely said that those rates and the Company's private line rates must be reasonably similar. If the competition from inexpensive microwave equipment of poor quality is so great as to threaten the common carrier service, let it be met by competitive private line rates as well as by packaged Telpak rates. And still further it seems to us that in the growing industrial and government areas which necessitate bulk communication services, cheap service of poor quality would be its own worst enemy. We are not impressed with the argument that the Commission, in ascertaining the competitive features of the situation by looking to average prices and costs, interposed a protectorate over inexpensive microwave equipment of poor quality.

IV

A. T. & T. says the Commission erred in its treatment of the burden of proof. It says the Commission took the position that the burden shifted to it to prove "the precise extent" of the competition it faced. This, of course, would be difficult to do, since much evidence is in the hands of

the manufacturers of microwave equipment, who are the Company's competitors. The Company says the Commission erred in not compelling Motorola to come forward with evidence of "actual" prices.

The Commission, as we have indicated, first determined that Telpak A and B were "like" services to private line service. Thus A and B appeared to be unlawful. Then the Commission pointed to what it found to be the Company's contention in support of the difference in rates (*i.e.*, the necessity to meet competition) and held: "Therefore, at this juncture, the burden is on A. T. & T. to demonstrate convincingly that the other users of common carrier services will, in fact, benefit by virtue of the application of the Telpak tariff." This seems to us to be in accord with rulings usually applied when a party comes forward with an affirmative defense to a *prima facie* illegality. Moreover in the present case, as we have pointed out, the Commission had before it, and examined at great length, two studies of the cost of private microwave. One was prepared by private engineers and presented by A. T. & T., and the other was presented by Motorola. The decision did not turn upon the burden of proof. That burden was at most a matter of convenience and of procedural precedence. We find no error on the part of the Commission on this point.

V

A. T. & T. says the Commission erred in failing to require an examiner's report. But Section 8(a) of the Administrative Procedure Act[9] permits the agency itself to issue a tentative decision in place of an examiner's report. Examination of this record satisfies us that the Commission complied with all procedural requirements.

Petitioners here vehemently declare that the ruling of the Commission now before us would destroy a vast im-

[9] 60 STAT. 242 (1946), 5 U.S.C. § 1008(a).

provement in mass communication and thus would hinder the effective operation of the Government and a major betterment in the conduct of major industrial and business enterprises. Such results would of course be disastrous. They are to be avoided at all costs consistent with legality. But we find no such lethal implications in the ruling. The Commission has not forbidden Telpak. At the most it has told the Company to make its rates for the new service non-discriminatory with its existing services. In dealing with the variations in price permissible on account of volume, the Commission seems to have applied the well-established rules applicable to competitive pricing. We do not find the horrendous effects pictured by petitioners.

Several petitioners urge points not presented or not stressed by A. T. & T., or cast in a different form from the A. T. & T. presentation. Xerox Corporation says it has invented and put on the market a method for transmitting facsimile which it calls LDX and which, it says, "represents a major addition to man's abilities to communicate beyond the range of sight and hearing." It says that Telpak is the only private line tariff which provides the bandwidth required for LDX. It says, "This becomes clearly apparent from comparative cost computations." But, as we have emphasized, the Commission has not proscribed the Telpak tariffs or the sale of broadband channels. The Xerox argument does not fit the Telpak offering as the A. T. & T. presents it. Rather it rests upon the lesser cost of Telpak to the user.

International Business Machines Corporation says the Commission's order must be reversed because the Commission did not formulate fair and reasonable rates for Telpak. The Commission had power to do so, but in a case of this sort we find no error in the Commission's leaving to the proponent of rate tariff the initial responsibility of submitting a non-discriminatory schedule. The practice is a commonplace in utility regulation.

Petitioners in No. 19466 (Aeronautical Radio, Inc., et al.) also make the foregoing contention and in addition say the Commission and its examiner erred in rejecting certain expert economic testimony. But the examiner and also the Commission found the proffered testimony to be a compilation of economic generalities without any showing of a relationship between the testimony and the issues in the case. They therefore deemed it to be of no probative weight in this controversy. We find no error in the ruling.

The Twin Coast Newspapers, Inc., and The Associated Press say the Commission, outside its authority, attempts to control the Company in the use of its plant facilities. The subject of the Commission's order is the service rendered the customer; in other words is at the marketing end of the process of manufacture and sale. Of course regulation of the sale may have a concomitant effect upon the manufacture, but that incidental effect does not nullify the regulatory authority over the sale.

We are not unmindful of the doctrine which overlies the whole of the consideration of this case. It is the well-established proposition that the findings of an administrative agency within the boundaries of its statutory power, if supported by substantial evidence on the record as a whole, are not to be disturbed by a court. But at the same time we cannot neglect that other well-established rule that the conclusions of the agencies are subject to judicial review, and for that purpose the reviewing authorities must know the bases upon which the conclusions rest. So we have explored the premises for the Commission's findings and conclusions in the case at bar. We find no reason to disturb them.

We commend the full text of the three opinions under review in this proceeding to the attention of any other reviewing authority and of any student researching in this area.

Affirmed.

APPENDIX B

On Petitions to Review Orders of the Federal Communications Commission

Before: Bazelon, Chief Judge, Prettyman, Senior Circuit Judge, and Wright, Circuit Judge.

Judgment

These cases came on to be heard on the record from the Federal Communications Commission, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the orders of the Federal Communications Commission on review in these causes be, and they are hereby, affirmed.

Per Curiam

Dated: September 15, 1966.

APPENDIX C

Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Title I, Section 1 of the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of

wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Title II, Section 201(b) of the Communications Act of 1934, 48 Stat. 1070, as amended, 47 U.S.C. § 201(b):

All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided,* That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications . . . . The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

Title II, Section 202(a) of the Communications Act of 1934, 48 Stat. 1070, as amended, 47 U.S.C. § 202(a):

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Title II, Section 204 of the Communications Act of 1934, 48 Stat. 1071, 47 U.S.C. § 204:

> Whenever there is filed with Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. . . .

Title II, Section 205(a) of the Communications Act of 1934, 48 Stat. 1072, 47 U.S.C. § 205(a):

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Title IV, Section 409 of the Communications Act of 1934, 48 Stat. 1096, as amended, 47 U.S.C. § 409:

(a) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, the person or persons conducting the hearing shall prepare and file an initial, tentative, or recommended decision, except where such person or persons become unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.

(b) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, any party to the proceedings shall be permitted to file exceptions and memoranda in support thereof to the initial, tentative, or recommended decision, which shall be passed upon by the Commission or by the authority within the Commission, if any, to whom the functions of passing upon the exceptions is delegated under section 155(d)(1) of this title: *Provided, however,* That such authority shall not be the same authority which made the decision to which the exception is taken.

(c)(1) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for a hearing, no person who has participated in the presentation or preparation for presentation of such case at the hearing or upon review shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case to the hearing officer or officers or to the Commission, or to any authority within the Commission to whom, in such case, review functions have been delegated by the Commission under section 155(d)(1) of this title, unless upon notice and opportunity for all parties to participate.

(2) The provision in subsection (c) of section 1004 of Title 5 which states that such subsection shall not apply in determining applications for initial licenses,

shall not be applicable hereafter in the case of applications for initial licenses before the Federal Communications Commission.

(d) To the extent that the foregoing provisions of this section and section 155(d) of this title are in conflict with the provisions of the Administrative Procedure Act, such provisions of this section and section 155(d) of this title shall be held to supersede and modify the provisions of that Act.

* * * *

Section 2 of the Administrative Procedure Act, 60 Stat. 237 (1946) 5 U.S.C. § 1001:

* * *

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule-making but including licensing. "Adjudication" means agency process for the formulation of an order.

* * *

Section 5 of the Administrative Procedure Act, 60 Stat. 239 (1946), 5 U.S.C. § 1004:

> In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—
>
> * * *
>
> (c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

Section 8 of the Administrative Procedure Act, 60 Stat. 242 (1946), 5 U.S.C. § 1007:

> In cases in which a hearing is required to be conducted in conformity with section 7—
>
> (a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule-making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

* * *

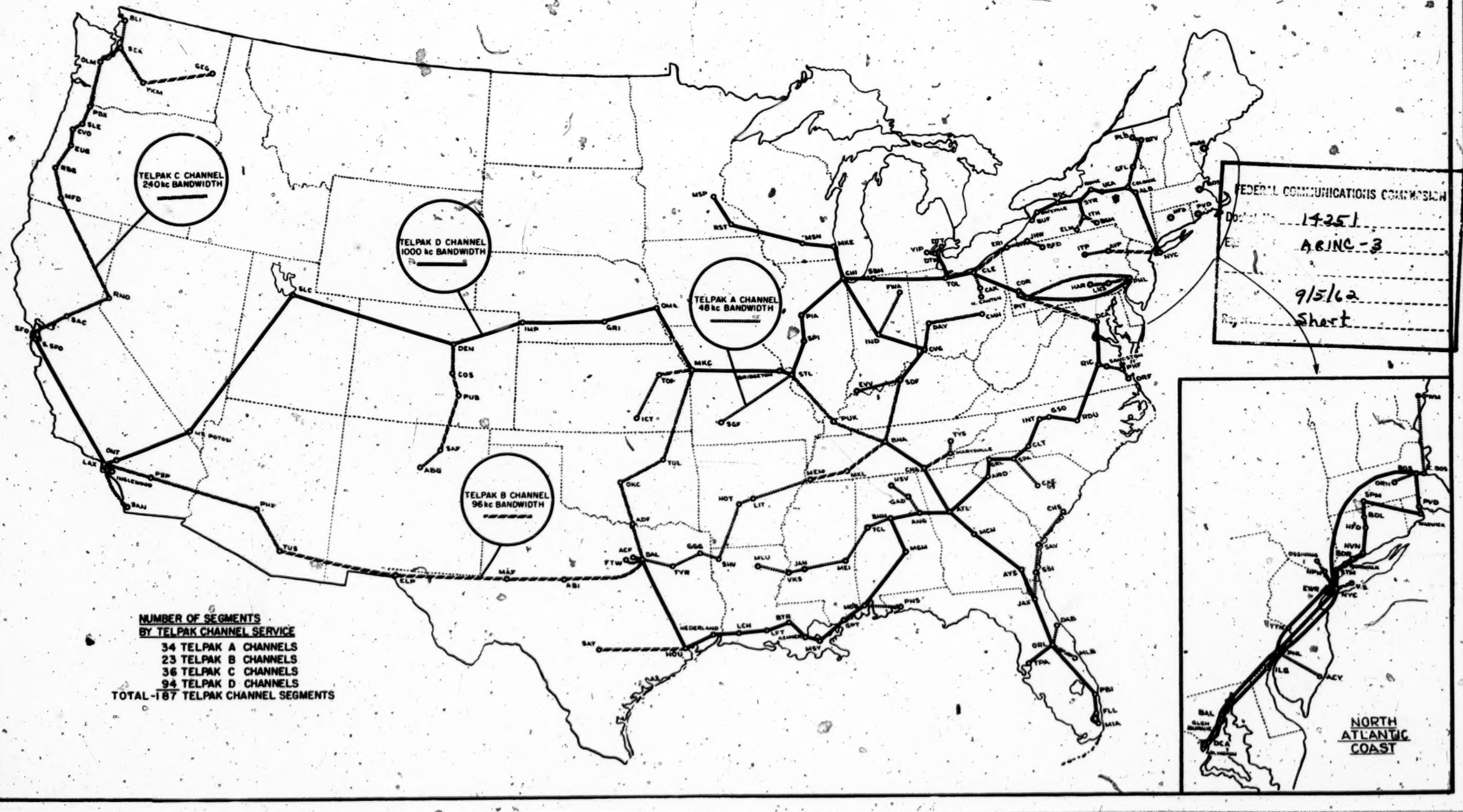
Section 12 of the Administrative Procedure Act, 60 Stat. 244 (1946), 5 U.S.C. § 1011:

> Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies

and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.

TELPAK SERVICES IN USE OR ON ORDER JULY-1962

AERONAUTICAL RADIO INC.
EXHIBIT NO. 3
FCC DOCKET NO. 14251



NUMBER OF SEGMENTS
BY TELPAK CHANNEL SERVICE

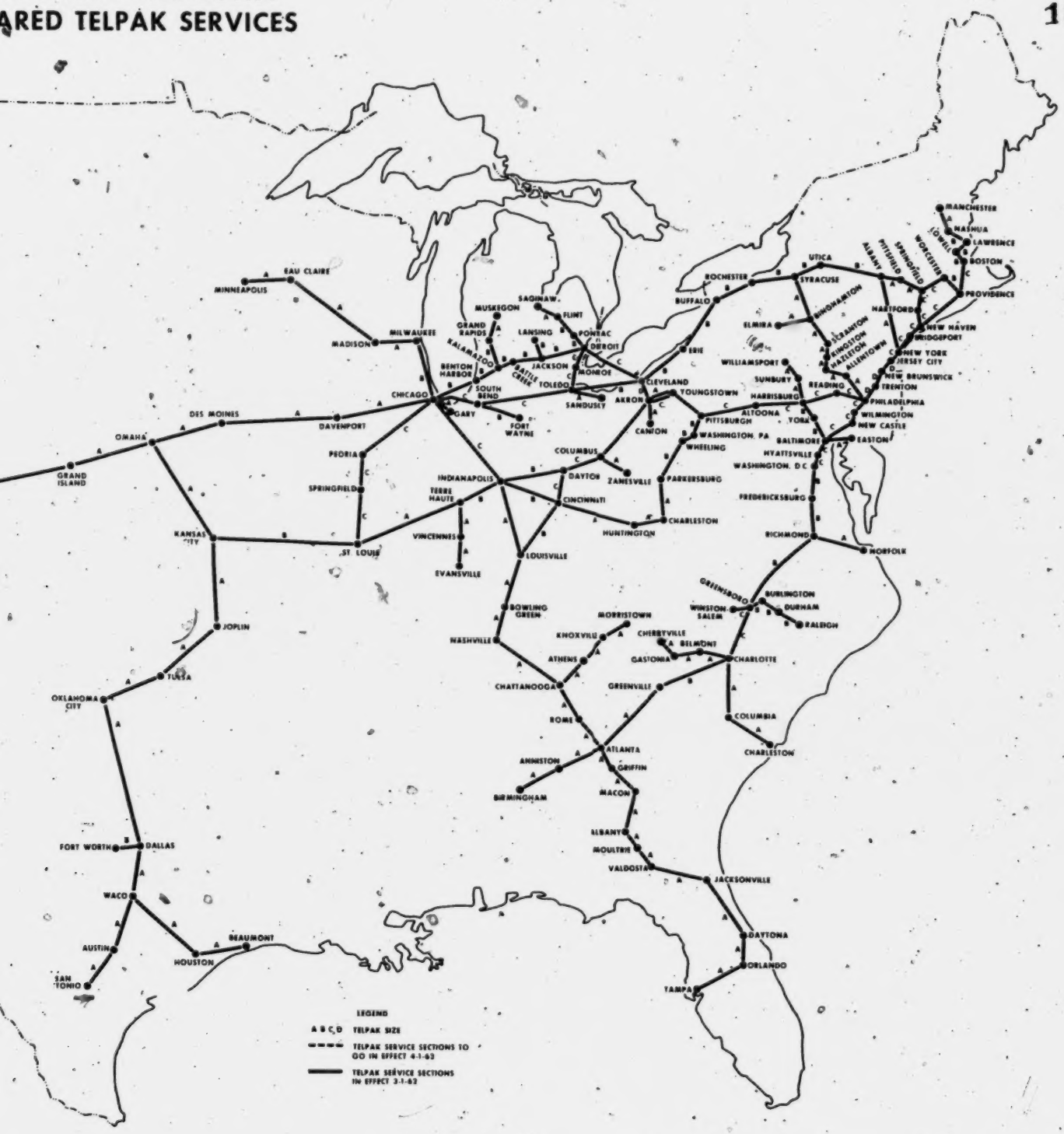
34 TELPAK A CHANNELS
23 TELPAK B CHANNELS
36 TELPAK C CHANNELS
94 TELPAK D CHANNELS
TOTAL-187 TELPAK CHANNEL SEGMENTS

FEDERAL COMMUNICATIONS COMMISSION
Docket 14251
Exhibit AERONC-3
Rec'd 9/5/62
Short

TRUC
SHARE
SEATTLE
TACOMA
PORTLAND
SALEM
EUGENE
ROSEBURG
MEDFORD
YREKA
MT SHASTA
REDDING
RED BLUFF
CHICO
YUBA CITY
SACRAMENTO
RENO
POCATELLO
OGDEN
SALT LAKE CITY
DENVER
OAKLAND
STOCKTON
REDWOOD CITY
PALO ALTO
MOUNTAIN VIEW
SAN JOSE
MODESTO
MERCED
FRESNO
BAKERSFIELD
LOS ANGELES
MONTEBELLO
ORANGE
OCEANSIDE
SAN DIEGO
EL CENTRO
YUMA
PHOENIX

RUCKING INDUSTRY
ARED TELPAK SERVICES

1891



[4469]

Charted on the map opposite this page are the cities in the United States where, through TELPAK, service to the public is made available for airline reservations and flight information.

The cities designated by triangles are served by TELPAK connections with consolidated reservations offices at cities designated by circles. Some cities designated as consolidated reservations office cities are also served, by some air carriers, by TELPAK connections with other consolidated reservations offices.

256 cities, with over 121,000,000 people, rely on TELPAK connections for airline reservations.

The map also shows where *Eastern*, a trunkline air carrier user of TELPAK, makes 1,071 TELPAK circuits available to the public and where *Mohawk*, a local service air carrier user of TELPAK, makes 221 circuits similarly available.

SERVICE TO PUBLIC THROUGH AIRLINES TELPAK

AIRLINES

TRUNK

LOCAL

— EASTERN

— MOHAWK

[4471]

Charted on the map opposite this page is the TELPAK circuitry made available to the public by the eleven trunk airlines, Pan American, Pacific Northern, and the thirteen local service airlines.

The 26 airlines whose reservations and flight information services are shown on the map are now carrying over 80,000,000 passengers annually.

Not shown are some 22 foreign flag airlines, freight forwarders, and other air carriers that also make extensive use of TELPAK in providing air transportation service.

SERVICE TO PUBLIC THROUGH AIRLINES TELPAK

4472

AIRLINES

— TRUNK

— LOCAL

— EASTERN

— MOHAWK

APPENDIX E

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

Docket No. 16979

In the Matter of

REGULATORY AND POLICY PROBLEMS PRESENTED BY THE INTERDEPENDENCE OF COMPUTER AND COMMUNICATION SERVICES AND FACILITIES

Notice of Inquiry

By the Commission: Commissioner Wadsworth absent.

I. Preliminary Statement

1. The modern-day electronic computer is capable of being programmed to furnish a wide variety of services, including the processing of all kinds of data and the gathering, storage, forwarding, and retrieval of information—technical, statistical, medical, cultural, among numerous other classes. With its huge capacity and versatility, the computer is capable of providing its services to a multiplicity of users at locations remote from the computer. Effective use of the computer is therefore becoming increasingly dependent upon communication common carrier facilities and services by which the computers and the user are given instantaneous access to each other.

2. It is the statutory purpose and responsibility of the Commission to properly regulate interstate and foreign commerce in communications so as to make available to all the people of the United States a rapid, efficient, nationwide and worldwide communications service with adequate facilities at reasonable charges (See Section 1 of the Communications Act of 1934, as amended). Thus, the Commission must keep fully informed of developments and improvements in, and applications of, the technology

of communications and of related fields. (See Section 218). Moreover, the growing convergence of computers and communications has given rise to a number of regulatory and policy questions within the purview of the Communications Act. These questions require timely and informed resolution by the Commission in order to facilitate the orderly development of the computer industry and promote the application of its technologies in such fashion as to serve the needs of the public effectively, efficiently and economically. To this end, the Commission is undertaking this inquiry as a means of obtaining information, views and recommendations from the computer industry, the common carriers, present and potential users, as well as members of the interested public. The Commission will then be in a position to evaluate the adequacy and efficacy of existing relevant policies and the need, if any, for revisions in such policies, including such legislative measures that may be required. It will also enable the Commission to ascertain whether the services and facilities offered by common carriers are compatible with the present and anticipated communications requirements of computer users. The Commission will then be in a position to determine what action, if any, may be required in order to insure that the tariff terms and conditions of such offerings are just and reasonable and otherwise lawful under the Communications Act. (See Section 201(b) and Section 202(a).)

• • •

APPENDIX F

Illustrative Excerpts From Unprinted Transcript

Tr. 1731-32

Presiding Examiner: Mr. Lesher, of what materiality would those bare-bone conclusions be in this record? *What kind of a finding would you put into the initial decision based on proof of that kind?* .[Emphasis added.]

Tr. 1901 (Cross-examination of AT&T witness by Mr. Wendt, counsel for Western Union.)

Mr. Wendt: For the purpose of application of the Telpak tariff. I think the witness and I understand one another perfectly.

The Chairman: Any problem with that, Mr. Lesher?

Mr. Lesher: No, sir.

The Presiding Examiner: It just seems to me to be calling for a series of legal conclusions.

Mr. Lesher: It seems to me that Mr. Wendt is asking in the context of how the company would apply its tariff regulations, which I think is proper for this witness. I might not agree with his conclusions, but I think he is proper, the proper man to be asked.

Tr. 1928

Mr. Conn [Counsel for Motorola]: . . . Didn't I understand Mr. Wendt to ask that the Examiner take official notice of the portions of the brief that he read?

Presiding Examiner: Mr. Conn, you know as well as I *the Examiner is not going to have anything to do with the decision in this case.* And I don't know, is it necessary, Mr. Lesher, to have official notice taken of that—

Mr. Lesher: I don't think it is necessary at that point. [Emphasis added.]

Tr. 1982-83

Mr. Lesher: Mr. Examiner, maybe I can take some of the worries out of Mr. Wendt's mind and Mr. Conn's mind

in saying that I agree with Mr. Conn's interpretation of the tariff. And maybe when the witness gets to New York he will give some consideration to clarifying the tariff.

The Witness: May I interrupt, Mr. Examiner, just briefly?

The Presiding Examiner: After all, the Examiner doesn't have to write the initial decision in this case, thank the Lord. And, since Mr. Lesher has now spoken up and apparently considers this line of inquiry to be material and significant, disagrees with the Examiner's ruling—

Mr. Lesher: I didn't mean that. I was trying to say we will take care of that later.

Presiding Examiner: Well, how will you take care of it later?

Mr. Lesher: By putting on my other hat and writing a letter to the company and say, "Your tariff is ambiguous. Clarify."

Tr. 2010-11 (Cross-examination of AT&T witness by Motorola counsel; AT&T counsel objected to line of questioning.)

Mr. Lesher: Mr. Examiner, since I cross-examined Mr. Scanlon on this same line, I am going to have to defend the materiality and relevancy of the line of questioning, and I do so.

Presiding Examiner: All right, the objection is overruled. I must say I am very puzzled by this, but I am overruling your objection.

Tr. 2088 (Offer by Motorola counsel of exhibit, to which AT&T counsel objected.)

Presiding Examiner: So what weight should be given to it really in the last analysis doesn't mean a thing. I don't know what weight should be given to it. Do you disagree with that statement, Mr. Lesher?

Mr. Lesher: No, I think you could do either one.

Presiding Examiner: In that case the objection is overruled, and Motorola Exhibit No. 8 is hereby received in evidence.

Tr. 2373-74 (Offer by AT&T counsel of exhibit.)

Presiding Examiner: Has the Bureau a position on this?

Mr. Lesher: Mr. Examiner, if what Mr. North is driving at is to refute the statement in that—the answer to the last question, number 45—I think that the study of private microwave costs, when put in juxtaposition with the tariff rates, will speak for itself, without the necessity of this graph—whether it be accurate or not. So I don't think it is necessary, frankly.

Presiding Examiner: Does the Bureau object to it?

Mr. Lesher: Therefore I would object to it on the grounds of materiality.

Presiding Examiner: Sustained.

Tr. 2411-13, J.A. 1460-61 (Request by Bureau counsel that evidence proposed to be offered by AT&T be excluded.)

Mr. Lesher: Perhaps, if I could get direct to the point why we do not believe that it would be helpful and has any decisional significance, the four customers we chose produced results. I will give you a concrete example of a return ranging from a negative five percent to a positive 78 percent. I believe that will explain one of the problems we had when we got the study, even though we had hoped that it would be helpful. To get right to the basic ground, we thoroughly have gone through the study and we find nothing in the study which we believe has any decisional significance or materiality.

Presiding Examiner: Are you prepared to state, Mr. Lesher, that the study does not in any way, shape, form or what have you, tend to confirm other evidence in the record provided by the telephone company?

Mr. Lesher: I will have to think about that one for a minute.

Presiding Examiner: Would you say that it tended to reenforce other evidence, Mr. Lesher—that it does have some value?

Mr. Lesher: I do not think, necessarily, Mr. Examiner, as a generality, because you can have too little evidence.

Presiding Examiner: The other evidence in the record contains a general study of the cost of TELPAK. If the study of the four specific customers tends in any way to reenforce what the telephone company has attempted to show as part of its direct case, are you prepared to state here and now that you would consider that to be immaterial and of no decisional significance? After all, *I recognize the fact, Mr. Lesher, that you are going to be responsible, I assume, for writing the initial decision in this case.* I do not think that you want to have the risk of going through a lengthy proceeding at this time only to have the case remanded at some later time because some evidence may have been excluded.

Mr. Lesher: I agree with that. I think that I can answer you this way: If I were writing a decision in the Telephone Company's favor I would, certainly, not rely on the four customer study. There is much better evidence in this record tending to show their position. [Emphasis added.]

(The Examiner asked Bureau counsel whether he would cross-examine on this exhibit if it were admitted, and Mr. Lesher answered in the affirmative (Tr. 2421). The following colloquy occurred (Tr. 2426):)

Presiding Examiner: How useful would it be, that is the question. I will ask Mr. Lesher. Mr. Lesher, what is the area of dispute between the parties on this four customer study? Is it that you want to use this as evidence, that you want to cross-examine on it in order to obtain precise information as to how it was compiled, or do you have some area of dispute that you want to cross-examine on?

Mr. Lesher: There are several areas which, I think, would be subject to cross-examination. I think there is, probably one area as to the validity of the figures themselves. Another would probably—I am now trying to anticipate some of the other intervenors besides myself—I am sure that the intervenors would take the Bureau's choice in the selection that was made.

Tr. 2529

Presiding Examiner: In terms of making findings, Mr. Andersen, in this case, after all, *you gentlemen are going to have to write this decision,* what is more meaningful, to have it by transmitters or to have it by station, and does it matter?

Mr. Andersen: Well, sir, I do not have any idea. That is why I was pursuing this line of questioning. [Emphasis added.]

Tr. 2535

Presiding Examiner: The Bureau is going to write the initial decision in this case, and since you are willing to make the information available to the Bureau, there is nothing the Examiner has to rule upon.